WONG SIEW CHOONG SDN BHD

v.

ANVEST CORP SDN BHD

FEDERAL COURT, KUALA LUMPUR
CHONG SIEW FAI CJ (SABAH & SARAWAK)
ABU MANSOR ALI JCA
ABDUL MALEK AHMAD JCA
[CIVIL APPEAL NO: 02-17-1998(W)]
1 JULY 1999

CONTRACT: *Formation - Construction - Whether there was a concluded contract - Uncertainty - Whether identity of purchaser certain - Sale and purchase of land through estate agent*

EVIDENCE: *Documentary evidence - Secondary evidence - Whether can be relied upon to test oral evidence of witnesses*

The respondent which had purportedly purchased some land through an estate agent had requested that its identity as a purchaser be kept confidential. Subsequently, a dispute relating to the identity of the purchaser arose wherein the High Court found in favour of the appellant, holding that the respondent was not the purchaser of the land from the appellant. On appeal, the Court of Appeal reversed the decision of the High Court and directed that the case be remitted to the High Court for an order to be made for the completion of the contract.

The appellant appealed. The main issue before the Federal Court concerned two groups of documents, the first of which was impugned as to both their making and contents, and the second as to their contents.

Held:

Per Chong Siew Fai CJ (Sabah & Sarawak)

[1] Apart from calling one witness whose testimony was irrelevant to any of the documents, the appellant had not called any other witness at the trial to prove or support any of the contentions it had raised to impugn the documents.

[2] More importantly, the trial judge had not made a finding that any of the documents called in question were false or unreliable. As such, there was no reason why the Court of Appeal could not rely on the documents and give credence to them in testing the oral evidence of the respondent's witnesses.

[3] The Court of Appeal was correct in finding that a binding and enforceable contract had been concluded between the parties by 14 October 1998.

[4] Any breach of the rules relating to the professional conduct of estate agents would render the agent liable to punishment but would not affect the formation and validity of the contract.

[Appeal dismissed with costs to the respondent.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Responden yang dikatakan sebagai telah membeli beberapa bidang tanah menerusi seorang ejen hartanah telah meminta supaya identitinya sebagai pembeli dirahsiakan. Berikutan itu, suatu pertikaian yang berhubung dengan identiti pembeli berkenaan telah berbangkit di mana Mahkamah Tinggi telah memberi keputusan secara memihak kepada perayu, dengan memutuskan bahawa responden bukanlah merupakan pembeli tanah berkenaan daripada perayu. Di atas rayuan, Mahkamah Rayuan telah mengakaskan keputusan Mahkamah Tinggi dan mengarahkan supaya kes tersebut diremitkan ke Mahkamah Tinggi supaya satu perintah dibuat bagi penyempurnaan kontrak.

Perayu telah merayu terhadap keputusan berkenaan. Isu utama di hadapan Mahkamah Persekutuan melibatkan dua kumpulan dokumen, di mana kumpulan dokumen yang pertama telah disangkal bagi kaedah pembentukan serta kandungannya manakala kumpulan yang keduanya pula disangkal bagi kandungannya.

Diputuskan:
Oleh Chong Siew Fai HB (Sabah & Sarawak)

[1] Selain dari memanggil seorang saksi yang mana testimoninya tidak relevan kepada mana-mana dokumen-dokumen berkenaan, perayu telah tidak memanggil mana-mana saksi yang lain ketika perbicaraan untuk membuktikan atau menyokong sebarang penegasan yang telah dibangkitkan olehnya untuk menyangkal dokumen-dokumen tersebut.

[2] Lebih-lebih penting lagi, hakim perbicaraan telah tidak memutuskan bahawa mana-mana daripada dokumen-dokumen yang diutarakan sebagai palsu atau tidak dapat dipercayai (unreliable). Oleh yang demikian, tidak ada sebarang alasan mengapa Mahkamah Rayuan tidak boleh bergantung kepada dokumen-dokumen tersebut dan menaruh kepercayaan terhadapnya dalam menguji keterangan lisan saksi-saksi responden.

[3] Mahkamah Rayuan berlaku betul dalam memutuskan bahawa sebuah kontrak yang mengikat dan berkuatkuasa telah dibuat di antara pihak-pihak berkenaan selewat-lewatnya pada 14 Oktober 1998.

[4] Sebarang kemungkiran dalam kaedah-kaedah yang berhubung dengan sikap profesional ejen-ejen hartanah akan menyebabkan ejen untuk menanggung hukuman tetapi tidak akan menjejaskan pembentukan dan keesahan kontrak.

[Rayuan ditolak dengan kos kepada responden.]

Legislation referred to:
Valuers, Appraisers and Estate Agents Rules 1986, r. 93(2)

For the appellant - Dr Cyrus Das (Harcharan Singh with him); M/s Harcharan & Co

For the respondent - Wong Kim Fatt (Gan Huey Piin & Tan Siew Siew with him); M/s Gulam & Wong

[Appeal from Court of Appeal; Civil Appeal No: W-02-351 of 1995]

Reported by Anne Khoo

JUDGMENT

Chong Siew Fai CJ (Sabah & Sarawak):

The postponement on 11 June 1999 enabled us to deliberate more closely the submissions of counsel for both sides in the light of the evidence adduced in this case.

Respecting the correspondences attacked by counsel for the appellant, they were classified as follows:

(a) Appeal Record (A.R.) 300C, AR 300D and AR 300E which counsel impugned both as to their makings and their contents, and

(b) AR 251, AR 275 and AR 277 respecting which formal proof was dispensed with but their contents were called in question.

(a) AR 300C was a letter dated 3 October 1988 purported to be from the respondent, Anvest Corporation Sdn. Bhd. ("Anvest") to Appraisal (Malaysia) Sdn. Bhd. (Estate Agent) agreeing to purchase the land in question on certain conditions and requesting to keep Anvest's identity confidential.

(b) Both AR 300D and 300E dated 4 October 1988 and 5 October 1988 respectively were purported to be from the Estate Agent to Miss Kheoh And Yeng (PW2) of Anvest. In AR 300D, the Estate Agent informed Miss Kheoh, *inter alia*, that they (the Estate Agent), as instructed, had forwarded $1,000 to the "landowner" and did not reveal the purchaser's identity, while in AR 300E the Estate Agent, *inter alia*, pointed out the

"landowner's" amendment of nine months to six months for payment of the balance of the purchase price and requested Miss Kheoh to confirm acceptance of the terms and conditions of sale as contained in letter dated 4 October 1988 (AR 254).

(c) AR 251 was a letter dated 17 August 1988 from Anvest to the Estate Agent indicating Anvest's intention to purchase a property and agreeing to pay agency fee.

(d) AR 275 was a letter dated 22 November 1988 from M/s Yusuf Lee Pathma & Marbeck (acting for Anvest) to M/s Raja Eleena Siew Ang & Tan (acting for Zodiac Development Sdn. Bhd.) in which the phrase "your agreement to assign" was used and which also indicated that any negotiation had to be subject to Anvest "obtaining the appropriate Court Order for specific performance against the Seller."

(e) AR 277 was a letter dated 30 November 1988 from M/s Raja Eleena Siew Ang & Tan (acting for Zodiac Development Sdn. Bhd.) to M/s Yusuf Lee Pathma & Marbeck (acting for Anvest) in which there was mention, *inter alia*, that Zodiac "are still interested in the property and are willing to enter into fresh negotiations with your clients for the purchase of the same from your clients only after your clients have purchased the above property from the Vendor."

As to the attack on the making and the contents of letters AR 300C, AR 300D and AR 300E:

(a) AR 300C and the contents therein, were proved by PW1 Tan Loy Fatt (Estate Agent's managing director) and by PW2 Kheoh And Yeng (Anvest's director) in AR 99 A-B, 104 C-D, 122 E-F and 133A.

(b) The making and contents of AR 300 D were proved by PW1 Tan Loy Fatt in AR 99 B-C and substantiated by PW2 Kheoh And Yeng in AR 123 A-B.

(c) Likewise, the making and the contents of AR 300E were proved by PW1 Tan Loy Fatt in AR 99 E-F and by PW2 Kheoh And Yeng in AR 123 D-F.

As regards the correspondences AR 251, 275 and 277, formal proof of their making was dispensed with except that their truth or veracity was disputed:

(a) the contents of the letter AR 251 were proved by PW2 Miss Kheoh in AR 121 E-F and substantiated by PW1 Tan in AR 97F.

(b) Letter AR 275 was in reply to AR 273 and AR 274 (see PW3 Lee Lim Huat's evidence in AR p. 141C). The contents of AR 275 were proved by PW3 Lee Lim Huat (Anvest's solicitor) in AR 141 A-B. As regards the contradiction in AR 275 suggested before us by counsel for the appellant, this was not specifically so raised at the trial in the High Court. It is therefore not surprising that there was no explanation from PW3. But PW3's evidence is clear that the intended assignment was to be from Anvest to Zodiac (see AR 140 C-D, 159 E to 160 A) (under re-examination)).

(c) As to the letter AR 277 (Zodiac's admission of taking assignment from Anvest), PW3 Lee Lim Huat (Anvest's solicitor) testified that that was the reply to his letter AR 275 (AR 141D).

It is to be noted that apart from calling DW1 the Registrar of the Board of Valuers Appraisers And Estate Agents whose testimony bore no relevance to any of the issues relating to the six letters dealt with above, the appellant/defendant did not call any other witness at the trial to prove or support any of the contentions raised before us.

In the cross-examination of the respondent's/plaintiffs witnesses, only certain aspects of some of the contents in some of the correspondences were raised. More importantly, the learned trial judge had made no finding that any of the correspondences called in question before us was or were false or unreliable.

In the circumstances, we see no reason why the Court of Appeal could not rely on the correspondences and give credence to them in testing the oral evidence of the respondent's/plaintiff's witnesses, more particularly the evidence of PW1 and PW4.

As stated by both the Court of Appeal and the High Court, the sole issue was the identity of the purchaser relating to the three correspondences AR 253, 254 and 256.

There can be no dispute that PW1 Tan Loy Fatt's evidence and PW4 Foo Fang Lim's evidence at the trial are conflicting in material respects. Testing their oral testimonies against the relevant documentary evidence in this case, we agree with the Court of Appeal that the evidence of PW1 was more reliable and ought to have been accepted in preference to that of PW4. We further agree that a binding and enforceable contract had been concluded between the parties by 14 October 1988 *vide* correspondences AR 253, 254 and 256.

As regards the contention of "hawking", on the basis, which we accept, that a contract had been concluded between the appellant and the respondent herein on 14 October 1988 and on the relevant evidence adduced, we agree that there had been no "hawking". In particular, we find that Zodiac Development Sdn. Bhd. came into the picture after 14 October 1988 and was purported to be an assignee of the respondent.

On the question of breach of r. 93(2) of the Valuers Appraisers And Estate Agents Rules 1986 by the estate agent, we agree that r. 93(2) relates to the professional conduct of an estate agent, a breach thereof would render it liable to punishment. On the facts and the circumstances of this case, we agree with the Court of Appeal that the breach would not affect the formation and validity of the contract.

We have read the judgments of the learned trial judge and of the Court of Appeal as well as perused the relevant oral and documentary evidence adduced in this case. In our view, the Court of Appeal was justified and was right in reversing the decision of the learned trial judge and directing the case to be remitted to the High Court for proper order to be made as to the completion of the contract.

We are unanimous that this appeal should be dismissed. This appeal is dismissed with costs to the respondent, such costs be taxed, if not agreed. Decision of the Court of Appeal is affirmed. Deposit to account of costs.

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